It now remains to examine this document itself. It is at once evident that it falls into two parts. The first part contains the complaint of the offence against himself—it reads:—

> "At 6.10 p.m. on 4.9.38 I was in my house cleaning the lamp when a Tamil named Thangapragasam came and asked for money owing to him—I owed him $154/-. I replied how can I have money now not having yet received my wages. Thereupon he struck me with a knife once on the left arm."

That is the complaint he made to the Lance Corporal immediately on his arrival at the Police Station—and on all the evidence I have no doubt whatever that he came with the intention of making that complaint and that it originated from himself alone and was in every sense spontaneous. It in no way results or proceeds from anything done in the police investigation.

It is therefore not affected by section 113 and so is admissible.

But the second part, the remainder of this statement, is of quite a different nature. It is a denial that he had either caused the injuries to Thangapragasam or knew anything about it.

It reads:—

> "I did not strike him at all. I do not know who struck Thangapragasam."

This refers to the injuries to Thangapragasam for which the accused had just then been arrested. It is not a complaint—it is an answer to the charge made against him.

I do not think the accused had any intention of mentioning the injuries of Thangapragasam in his Report when he came to the Police Station even assuming that he knew of such injuries.

When persons come to a Police Station to make a complaint that other persons have assaulted them, they seldom or never make any mention of the inconvenient fact that such other persons have injuries perhaps far more serious than their own.

If accused did not know of Thangapragasam's injuries then it is quite clear that his statement referring to them is the result of and proceeds from his having been just that moment arrested and charged with causing them.

I have no doubt whatever that any statement made by any accused person in reply to the charge made when he is arrested is inadmissible under section 113. It is the direct result of an act done by the Police in the course of the investigation namely the arrest of an accused person.

I have very little doubt, in fact I think it is highly probable that the second part of this statement was made by the accused because he had just been arrested, and is in answer to the charge. It would be sufficient to merely conclude that it was just probable—for the standard of proof called for is no higher.

That second part I therefore hold to be inadmissible under section 113 of the Criminal Procedure Code.

Objection upheld.

[APPELLATE CIVIL JURISDICTION]

AITKEN, J.

May 1, 1939.

RAMAN CHETTIAR

v.

PALANIAPPA CHETTIAR AND ANOTHER.

(NEGRI SEMBILAN CIVIL SUIT No. 49 of 1937)

Civil Procedure Code (Cap. 7) S. 369 (i)—security for costs—discretion of the Court.

The power given to a Judge by section 369 (i) of the Civil Procedure Code is discretionary and one which the Court ought or ought not to exercise according to the circumstances of each case.

In a suit for a declaration that certain immovable properties were properties of a firm of which the plaintiff and the defendants were partners, the defendants, nearly a year and a half after the commencement of the suit, applied to the Registrar by summonses in chambers for an order that the plaintiff give security for costs on the grounds, amongst others, that the plaintiff had no immovable property within the Federated Malay States and that the plaintiff having left for India was not likely to return to the Federated Malay States.

Held, that, having regard to all the circumstances of this case, namely, (1) that the suit itself appeared to be a **bona fide** suit, and raised important issues for determination by the Court, (2) that there had been great delay in making the applications, for which the plaintiff was in no wise responsible, and (3) that there was reason to suppose that the applications had been brought rather for the purpose of embarrassing the plaintiff in the conduct of his suit than for any purpose which might serve the ends of justice, the Court would not order the plaintiff to give security for costs of the suit.

APPEAL from the order of the Registrar dated the 11th of March 1939.

Jeff for plaintiff.
Rintoul for 1st defendant.
Ramani for 2nd defendant.

Cur. Adv. Vult.

Aitken, J.—This application is made under section 369 (i) of the Civil Procedure Code which provides, *inter alia,* as follows:—

> "Where, at the institution or at any subsequent stage of a suit, it appears to the Court that a sole plaintiff is residing out of the Federated Malay States and that such plaintiff does not possess any sufficient immovable property within the Federated Malay States other than property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff to give security, within a time to be fixed by the order, for the payment of all costs incurred and likely to be incurred by any defendant."

Both the defendants in this case applied to the Registrar by summonses in chambers dated the 1st of February, 1939, that is nearly a year and a half after this suit commenced, for an order on the plaintiff to give security for their costs. Each of these summonses was supported by one affidavit, and one affidavit only, sworn by the applicant's attorney; and since the attorney of the second defendant did no more than "endorse" the statements contained in the affidavit sworn by the first defendant's attorney, I will quote the latter's affidavit only. In view of the events leading up to these applications and the circumstances in which they were made, I feel bound to set out evidence filed in their support.

Leaving out the purely formal parts, the affidavit of the first defendant's attorney reads as follows:—

1. "I am the attorney of the first defendant herein.
2. The plaintiff having instituted the action has left the Federated Malay States and is now resident in India.
3. I know of my own knowledge that the plaintiff is not possessed of any immovable property within the Federated Malay States.
4. The plaintiff has no General Attorney in this country, but has appointed two separate attorneys to attend to two specific and separate matters pending in this Honourable Court.
5. In Civil Suit No. 52 of 1937 of this Honourable Court the plaintiff has had judgment entered against him on the 18th day of January, 1938, whereon Bankruptcy proceedings were taken.

   In Civil Appeal 3 of 1938 the Court of Appeal, on the 23rd day of November, 1938, set aside the Bankruptcy Notice.
6. I verily believe that the plaintiff's leaving this country has to do with the Bankruptcy proceedings that were then taken and are likely to be further taken against him, and it is unlikely the plaintiff will return to this country."

Although neither of the defendants is directly or avowedly interested in the civil suit against the plaintiff, No. 52 of 1937, referred to in this affidavit I have just quoted, yet it is to be observed that the deponent stresses the bankruptcy proceedings which ensued thereon against the plaintiff, and even goes so far as to assert that further bankruptcy proceedings are likely to be taken against him—presumably under the same judgment.

The Plaintiff was absent in India when these applications were filed, and the only affidavit sworn in answer thereto was one sworn by an Indian clerk residing in Seremban who knows the plaintiff. His affidavit is dated the 14th of February, 1939, and states that he had telegraphed to the plaintiff to return, and was expecting him to come back to Seremban in two or three weeks from that date.

When these applications came on for hearing before the learned Registrar on the 14th of February, 1939, Mr. Rintoul, for the two defendants, quoted extracts from the following affidavits which the plaintiff had sworn in Civil Suit No. 52 of 1937 and the bankruptcy proceedings which ensued thereon:—

Affidavit of 24.2.38 in Civil Suit No. 52. of 1937,
Affidavit of 7.3.38 in Civil Suit No. 52 of 1937,
Affidavit of 27.4.38 in Bankruptcy Petition No. 1 of 1938, and
Affidavit of 16.8.38 in Civil Suit No. 52 of 1937.

Learned Counsel for the Plaintiff took no objection to this highly irregular procedure by learned Counsel for the defendants, and the learned Registrar, in his judgment, admits that he read the affidavits from which Mr. Rintoul had quoted, or at any rate so much of them as Mr. Rintoul had quoted, before he prepared his written judgment. It seems to me, therefore, that I must consider those four affidavits as having been admitted in evidence, because they are undoubtedly relevant to the issues as to whether the plaintiff is residing out of the Federated Malay States, and as to whether he has any sufficient immovable property within those States. I am clearly of opinion, however, that an objection to their admissibility in the form and manner in which they were tendered in evidence before the learned Registrar should and would have been upheld. They should, of course, have been

exhibited to an affidavit filed in support of the defendants' applications, or at any rate quoted in whole or in part in such an affidavit. Here, again, it is to be observed that the defendants or their attornies seem to have a very thorough knowledge of Civil Suit No. 52 of 1937 and the bankruptcy proceedings consequent thereon, though neither of them is avowedly interested in the same.

The learned Registrar eventually read a written judgment dismissing these applications on the 11th of March, 1939. In that judgment he animadverted on the practice of referring to documents filed in other suits on the hearing of an application such as this, and though he admitted to having read the passages in the four above mentioned affidavits which Mr. Rintoul had quoted to him, he decided to disregard them *in toto*. He therefore based his decision on the two affidavits filed in support of these applications, to which I have already referred in sufficient detail, and held as follows:—

> "Now although it is not in evidence, yet it is a well-known fact that almost every native of India or any other foreign country, who resides in the Federated Malay States for commercial purposes or otherwise, goes back to India or to his native land for a holiday after a certain period of residence in the Federated Malay States, and for other purposes after any period of residence, and on the evidence contained in the two affidavits the plaintiff appears to have done nothing more than either of these.
>
> For this reason to hold that he has since the institution of this suit changed his place of residence by leaving the Federated Malay States and is resident in India, would, in my humble opinion, be contrary to section 369 (i) of the Civil Procedure Code under which the application is made."

I find myself in agreement with the learned Registrar's animadversions, but not in agreement with his refusal to consider those passages in the four above mentioned affidavits of the plaintiff which had been quoted to him by Mr. Rintoul without any objection being raised by the other learned Counsel engaged. As I have already pointed out, it cannot possibly be contended that those passages are not relevant to the issues as to whether the plaintiff is residing out of the Federated Malay States, and as to whether he has any sufficient immovable property within the Federated Malay States. They are, indeed, very relevant to those issues and were, in my opinion, admitted in evidence though they could have been rejected in the form in which they were tendered had an objection been taken at the proper time. For the purposes of this appeal I shall take into consideration everything that is stated in those four affidavits, because it would not be fair to consider only those passages therein which tell in the defendants' favour.

When this appeal came before me on the 24th of April, 1939, the issues of fact with which the learned Registrar had concerned himself were liquidated, so to speak, by Mr. Jeff, who appeared for the plaintiff, admitting that the four above mentioned affidavits of the plaintiff establish (1) that he is residing out of the Federated Malay States, and (2) that he does not possess any immovable property within the Federated Malay States other than the property now in suit. He also raised no objection to my considering those four affidavits.

The only question, then, for me to decide is this:—how shall I exercise my discretion under section 369 (i) of the Civil Procedure Code—in favour of the plaintiff or of the defendants? I do not forget that at one stage of the argument Mr. Ramani and Mr. Rintoul, for the defendants, went so far as to suggest that I had no discretion in the matter as soon as residence without the jurisdiction and no immovable property within the same had been proved. When I pointed out to them, however, that the judgment in the case on which they relied to support that suggestion—*In the goods of Premchand Moonshee,* 21 Calcutta 832—contained these words "it seems to me that the power given under the section is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case", they shifted their ground and contended that once the facts of residence without the jurisdiction and no immovable property within were established, the onus is on the plaintiff to show special circumstances why my discretion should be exercised in his favour. According to their view no such circumstances can be shown to exist in this case, and therefore I must exercise my discretion in favour of the defendants. On the other hand Mr. Jeff, for the plaintiff, contended that the circumstances of this case clearly indicate an exercise of my discretion in favour of the plaintiff.

I will therefore proceed to examine the circumstances of this case, and for that purpose I shall consult the proceedings in the suit itself, the affidavits filed in support and against these applications, and the above mentioned four affidavits of the plaintiff which are admittedly in evidence before me.

The plaint in this suit—No. 49 of 1937—was filed on the 10th of August, 1937. Omitting the formal parts, and condensing the description of certain immovable properties in paragraph 5 thereof, it reads as follows:—

1. "The plaintiff is a moneylender residing at No. 6 Cameron Street, Seremban.

   The 1st defendant is also a moneylender at present in India, but represented in this country by his agent Muthiah s/o Ramasamy Naidu who resides at 74 Paul Street, Seremban.

   The 2nd defendant is the wife of the 1st defendant and is now in India, but is represented in this country by her agent the said Muthiah.

2. In the year 1927 the plaintiff and the 1st defendant herein commenced a moneylending business in Seremban in partnership under the style or firm of P.L.R.M.P.L.

3. Such partnership is still subsisting, but the plaintiff has commenced proceedings in this Honourable Court against the 1st defendant for a dissolution of such partnership and for other relief and such action is now pending.

4. During the period of such partnership the conduct of the partnership business was in the hands of the 1st defendant or of agents appointed by him, and the plaintiff was never in personal charge.

5. In the course of the partnership business various immovable properties were acquired from time to time with partnership funds, and following the usual Chettiar custom such properties were registered in the name of the 1st defendant with the name of the firm prefixed in this wise 'P.L.R.M.P.L. Palaniappa Chettiar'.

   The description of and the title to such properties and the date of acquisition thereof by the partnership are as follows:—

   (Here follows particulars of 28 immovable properties acquired by the alleged partnership during the period 18th of December, 1928, and 15th of September, 1934).

6. On the 29th day of July, 1935, the 30th day of July, 1935, the 6th day of August, 1935, the 10th day of September, 1935, and the 26th day of June, 1936, the 1st defendant, without the knowledge of the plaintiff, transferred all the above properties to the name of the 2nd defendant who is his wife.

7. The plaintiff states that all such transfers were colourable transactions made without consideration, and designed to defeat the plaintiff's rights in the partnership business and also the claims of the creditors of the said businesss.

   The plaintiff prays judgment for:—

   1. A declaration that the properties set out in paragraph 5 hereof were the properties of the firm of P.L.R.M.P.L.

   2. A declaration that the transfers thereof to the 2nd defendant are void.

   3. Such further or other relief as justice may require.

   4. Costs."

The first defendant filed his written statement of defence on the 27th of November, 1937, and omitting formal parts his statement of defence reads as follows:—

1. "Paragraph 1 of the Statement of Plaint is admitted except in so far as it alleges that this defendant is represented in this country by one Muthiah son of Ramasamy Naidu, this defendant being represented by his attorney Kurugappan son of Ramasamy Naidu.

2. Paragraph 2 of the Statement of Plaint is admitted.

3. Paragraph 3 of the Statement of Plaint is admitted, except in so far as it alleges that proceedings for dissolution of partnership had been commenced at the date thereof. The said proceedings were commenced on the 23rd day of September, 1937.

4. Paragraph 4 of the Statement of Plaint is admitted. This defendant states that the plaintiff also took part in the direction and control of the business, though he was not actually conducting the business.

5. Paragraph 5 of the Statement of Plaint is admitted.

6. Paragraph 6 of the Statement of Plaint is admitted, but it is not admitted that the plaintiff had no knowledge of the same.

7. Paragraph 7 of the Statement of Plaint is denied.

8. This defendant says that the plaintiff is not entitled to the reliefs claimed."

The second defendant filed her written statement defence on the same 27th of November, 1937, and omitting formal parts her statement of defence reads as follows:—

1. "This defendant admits paragraph 1 of the Statement of Plaint.

2. This defendant has no personal knowledge of the allegations in paragraphs 2, 3, 4 and 5 of the plaint.

3. This defendant admits having had the properties transferred to her for the debt owed her by the firm, but has no knowledge if or not the plaintiff was aware of the same.

4. This defendant denies each and every the allegations in paragraph 7 of the plaint, and says that she took a transfer of the properties *bona fide* and for consideration and that therefore the plaintiff is not entitled to the declarations claimed.

5. This defendant will also contend that such declarations cannot be made having regard to section 42 of the Land Code (Cap. 138)."

From a mere perusal of the pleadings in this case, it will appear that this suit raises certain very serious issues which constitute a very proper subject for judicial investigation. It cannot be contended that this suit is in any way frivolous or vexatious, nor is there any good reason to suppose that it has been brought otherwise than *bona fide*.

I must now turn to the four above mentioned affidavits of the plaintiff, and from them I gather that on some date in the second half of the year 1937 a certain A.K.M.L. Letchumanan Chettiar arrived at Seremban from India, and commenced a suit against the plaintiff in the Supreme Court here for $2,971.81, interest thereon and costs. According to the plaintiff's affidavits this Letchumanan Chettiar is a relative of the first defendant, and came all the way from India to Seremban to sue the plaintiff for a debt he had contracted in Burma for the sole purpose of embarrassing the plaintiff in the conduct of this suit and another suit, No. 56 of 1937, which he was bringing against the first defendant for a dissolution of the partnership between the first defendant and himself.

On the 18th of January, 1938, A. K. M. L. Letchumanan Chettiar obtained judgment against the plaintiff in the said sum of $2,971.81, together with interest thereon and costs.

To return to this suit, in point of fact it was actually set down to be heard on the 12th of April, 1938, but on the 21st of March, 1938, the first defendant took out a summons in chambers asking for the issue of a letter of request addressed to the Subordinate Judge at Sivaganga, South India, for the examination of some witnesses, including himself and his wife, the second defendant, in India.

On the 4th of April, 1938, the plaintiff followed the first defendant's lead, and took out a summons in chambers, returnable on the 25th of that month, asking for a commission to examine a number of witnesses in India on his behalf.

Just about the same time, i.e. March or April, 1938—I cannot ascertain the exact date from the evidence before me—A.K.M.L. Letchumanan Chettiar commenced bankruptcy proceedings against the plaintiff by suing out a bankruptcy notice founded on the plaintiff's failure to pay the judgment debt of the 18th of January, 1938, which debt the bankruptcy notice apparently stated at the total amount of $3,421.81.

According to the plaintiff these bankruptcy proceedings were taken with the object of obstructing him in the prosecution of this suit and his suit for dissolution of partnership, and it is common ground that they did, by order of the Court, hold up the progress of this suit until those proceedings eventually ended in the Court of Appeal and in the plaintiff's favour on the 23rd of November, 1938. At an early stage in this judgment I have already referred to the knowledge possessed by the first defendant's attorney of Letchumanan Chettiar's judgment and the bankruptcy proceedings thereon against the plaintiff, and have drawn attention to the strange assertion of that attorney that further bankruptcy proceedings founded on the same judgment are likely to be taken against the plaintiff. I have seen no contradiction of the plaintiff's assertions in regard to the conduct of Letchumanan Chettiar, and the evidence before me leads me to suppose that they are probably and substantially true.

As soon as the bankruptcy proceedings against him had terminated in his favour, the plaintiff brought on his application for a commission to examine certain witnesses in India on his behalf before Raja Musa, Acting J., who was then at Seremban, and obtained an order for such a commission on the 16th of December, 1938. The first defendant did not proceed so expeditiously with his application for a letter of request, but waited until the learned Registrar had heard these two applications for an order upon the plaintiff to give security for costs before he took any further steps to obtain an order for such a letter. Eventually, on the 27th of February, 1939, the first defendant obtained an order for a commission to issue for the examination of certain witnesses on his behalf in India. Both these commissions have now been issued, and this case will be ready for trial as soon as the depositions taken thereunder are received from India.

My examination of the circumstances of this case, so far as they can be ascertained from the proceedings in the suit itself and the affidavits in evidence on these two applications for security for costs, is now complete. I hold, in agreement with the Indian case of *In the goods of Premchand Moonshee,* which I have already cited, that the power given to a Judge by section 369 (i) of the Civil Procedure Code "is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case." Upon a prolonged and careful consideration of all the circumstances of this case, so far as the same are known to me, I have come to the conclusion that I ought not to exercise my discretionary power under section 369 (i) of the Civil Procedure Code in the defendants' favour. The suit itself appears to be a *bona fide* suit, and it is certainly one which raises grave and important issues for the determination of the Court. There has been great delay in making these applications, for which the plaintiff is in no wise responsible. Lastly, there is reason to suppose that these applications, and certain other legal proceedings, have been brought rather for the purpose of embarrassing the plaintiff in his conduct of this suit than for any purpose which may serve the true ends of justice.

This appeal from the learned Registrar's decision of the 11th of March, 1939, is therefore dismissed, and with costs.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) AND TERRELL, J.A.

May 22, 1939.

LIOW CHOW AND ANOTHER

vs.

PUBLIC PROSECUTOR.

(NEGRI SEMBILAN CRIMINAL APPEAL No. 4 of 1939)

Criminal Procedure Code (Cap. 6), Sections 316, 321, 323—sentences only to be altered on appeal if illegal or manifestly excessive or inadequate.

The sentence of a Court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. **Abdul Rahman v. Public Prosecutor (Johore)** 7 M.L.J. 219 approved.

REFERENCE to the Court of Appeal from the Court of a Judge under Courts Enactment (Cap. 2) S. 45 A.

The Appellants were not represented and did not appear.

Adrian Clark, Public Prosecutor, in person.

The judgment of the Court of Appeal was as follows:—

The appellants were convicted of riot and were sentenced to five months R.I.

The evidence shewed that the appellants were members of a mob of 200 or 300 who attacked the police and the appellants were among those who stoned the police with a view to rescuing from police custody two rioters who had been arrested.

On appeal to the Court of a Judge the sentence was reduced to three months R.I.

Sections 307, 316 and 323 gives power to the Appellate Court to vary sentences. Whatever may be the true meaning of section 321 it clearly indicates that a sentence should not be set aside unless it is wrong. Probably, the words "against the weight of evidence" as used in connection with sentence means no more than that the sentence should accord with the gravity of the particular offence as disclosed in the evidence.

The learned judge says "judges exist for a variety of reasons and I rather think that the polishing of sentences must be one of them". The metaphor is an unhappy one. "Polishing" indicates minute